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No. 04-

IN THE

Supreme Court of the United States

CHOHUNG BANK,

Petitioner,

and

HANVIT BANK, SHINHAN BANK,

Defendants,

v.

GARY B. FILLER, TRUSTEE OF THE TRA RIGHTS TRUST AND LAWRENCE PERLMAN, TRUSTEE OF THE TRA RIGHTS TRUST, JANET BAKER, JAMES BAKER, JK BAKER, LLC AND JM BAKER, LLC

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), this Court construed the "ownership interest" clause under the Foreign Sovereign Immunities Act ("FSIA") in the context of an indirectly-owned subsidiary seeking to qualify as a foreign state based on the status of entities several corporate layers above it. Left open by this decision, however, is a question upon which a split in the circuits persists and which carries important consequences for international relations and comity:

> When an organ of a foreign sovereign—that is to say, a governmental institution that acts as the extension of the state—directly owns a majority interest in a corporation, is that corporation immune from suit in the United States under the FSIA?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioner states that its parent corporation is Shinhan Financial Group Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-11a) is reported at 378 F.3d 213. The district court's initial opinion dismissing the case on sovereign immunity grounds is reported at 247 F. Supp. 2d 425 (App. 14a-24a). Its subsequent decision to reinstate the case is unreported (App. 12a-13a).

JURISDICTION

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1330(a), 1331, 1332, and 1367. The court of appeals' judgment was entered on August 6, 2004. App. at 1a. This Petition is accordingly timely filed, and the jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The definitional section of the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1603, provides in relevant part:

> § 1603. **Definitions**
>
> For purposes of this chapter—
>
> (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
>
> (b) An "agency or instrumentality of a foreign state" means any entity –
>
> (1) which is a separate legal person, corporate or otherwise, and
>
> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title, nor created under the laws of any third country. . .

The following section, 28 U.S.C. § 1604, provides immunity for foreign states that meet the definition above:

> Subject to existing international agreements to which the United States is a party at the time of enactment of this

> Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this Chapter.

STATEMENT OF THE CASE

This case involves an organ of the Republic of Korea—the Korean Deposit Insurance Corporation ("KDIC")—that invested over $2 billion dollars of public funds to acquire a majority interest in Petitioner Chohung Bank. At all times relevant to the underlying dispute, and when the suits were initiated, the KDIC directly (*i.e.*, there were no intermediary subsidiaries or affiliates) owned over 80% of Petitioner.[1]

The KDIC

A governmental institution established by statute and presidential decree, the KDIC performs traditional governmental functions for the Republic of Korea. The KDIC is funded by the Korean government, governed by Korean statute, and overseen by senior government officials, including the Korean President and the Ministry of Finance and Economy, both of whom supervise all aspects of its activity.

Korea created the KDIC in an effort to restore solvency to Korea's national banks and to stave off a crisis in its banking sector. Its duties, defined by statute and presidential decree, include the management and operation of a deposit insurance fund and the provision of "financial assistance" to troubled Korean financial institutions. The deposit insurance fund includes public funds such as "[c]ontributions from the gov-

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[1] In August 2003, over two years after the underlying litigation was commenced, the KDIC transferred its interest in Petitioner to a private entity. Because immunity under the FSIA is determined at the time the complaint is filed, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 478-80 (2003), the subsequent transfer is irrelevant for sovereign immunity purposes.

ernment," "[s]tate property granted by the government to the KDIC," and the proceeds of government-issued deposit insurance fund bonds. The Korean government prescribes how and from where the KDIC may borrow funds for its operations. And the KDIC must obtain approval from Ministry of Finance and Economy before certain payments may be made from the deposit insurance fund.

The day-to-day operations of the KDIC are run by a Policy Committee whose powers and duties are specified by law. The Policy Committee consists of government officials, including, among others, the Vice Minister of the Ministry of Finance and Economy, the Vice Minister of the Korean Ministry of Planning and Budget, the Vice Chairman of the Korean Financial Supervisory Commission, and the Vice Governor of the Bank of Korea.

The relevant statute prescribes the number of officers, including directors, and their duties. The President of the KDIC, for example, is "appointed and dismissed by the President of the Republic of Korea . . . ." Directors and certain other KDIC officials "shall be appointed and dismissed by the Minister of the [Ministry of Finance and Economy]." All officers of the KDIC must be Korean citizens, and officers and employees of the KDIC "shall be regarded as public officials" for purposes of certain Korean criminal laws.

Petitioner Chohung Bank

Chohung Bank is a Korean banking institution headquartered in Seoul, Korea. At the time these lawsuits were filed, the KDIC directly owned over 80% of the shares of Petitioner, with an investment of more than $2 billion. KDIC acquired its majority interest in Petitioner in connection with the public function of maintaining confidence in Korea's financial markets and stabilizing troubled financial institutions.

The Underlying Dispute and Lower Court Decisions

The underlying litigation was part of a wave of lawsuits trailing the collapse of Lernout & Hauspie Speech Products NV ("L&H Belgium"), a speech recognition software company headquartered in Belgium. Respondents, who were shareholders in L&H Belgium, brought these cases against three of Korea's largest banks, Hanvit Bank, Shinhan Bank, and Petitioner.

In essence, Respondents sought to link Petitioner to the fraud that felled L&H Belgium by claiming that certain loan transactions that it consummated with other non-parties in Korea ultimately facilitated the fraudulent scheme which allegedly induced Respondents to invest in L&H Belgium. Yet there is no allegation that Petitioner made any statement about L&H Belgium, that Petitioner made any statement about its Korean subsidiary ("L&H Korea") prior to Respondents' investment in L&H Belgium, or that Petitioner had any role in shaping L&H Belgium's financial statements.

Respondents nevertheless filed two separate actions, in 2001 and 2002, in the Southern District of New York. These cases sought hundreds of millions of dollars in alleged actual damages, plus statutory trebling and unspecified other damages. The cases were assigned to the same judge and proceeded in tandem. Although the cases were never consolidated, the Second Circuit resolved them together in the same opinion.

Petitioner and Hanvit Bank[2] sought dismissal of the actions based on sovereign immunity. The district court initially granted the motion, concluding that Chohung Bank and Hanvit Bank were "foreign states" under the FSIA. App. at

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[2] Hanvit Bank sits in a different position than Petitioner because it is only indirectly, rather than directly, owned by the KDIC. An intermediate subsidiary (Woori Finance Holdings Co. Ltd.) separates the two.

18a. The district court further found that the KDIC was an "organ" of the Korean government and that the "treasury of the Republic of Korea would be affected by a judgment against banks owned by the KDIC." *Id.* at 17a.

When this Court handed down *Dole Food Co. v. Patrickson*, 538 U.S. 468 (2003), however, the district court revisited its decision. With minimal analysis, the district court vacated its prior decision and "h[e]ld that Chohung Bank is not a foreign sovereign" under the FSIA. App. at 13a.

On appeal, the Second Circuit affirmed. App. at 11a. Despite appreciating the fact that *Dole* dealt with an entity that was a subsidiary several times removed from the foreign state (rather than an entity directly owned by a foreign state as defined by the FSIA—an organ of a foreign state), the court of appeals refused to accord any significance to this distinction. The Second Circuit agreed with the district court, however, that the KDIC was an organ of the Korean government.

REASONS FOR GRANTING THE WRIT

I. THE UNANSWERED QUESTIONS IN *DOLE* HAVE LEFT UNCERTAINTY IN THE LOWER FEDERAL COURTS

The Second Circuit effectively rewrote the FSIA, limiting the statutorily defined term "foreign state" to "foreign government." It did so despite recognition that Congress endeavored to define "foreign state" expansively rather than narrowly. And it did so in spite of express language in the FSIA defining "foreign state" to "include[] a political subdivision of a foreign state or an agency or instrumentality of a foreign state. . ." 28 U.S.C. § 1603(a). An "agency or instrumentality," in turn, is a separate entity organized under the laws of that nation that "is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or

political subdivision thereof." *Id.* at § 1603(b). The Second Circuit also overlooked other aspects of the statute that belie its conclusion. *See* 28 U.S.C. §§ 1603(a), 1608, 1611.

As evidenced by the decision below, the FSIA's definitional section has yielded considerable confusion amongst the lower courts, and although this Court recently sought to alleviate some of that tension, the *Dole* decision left several important questions unanswered. The pre-*Dole* split between the Ninth Circuit, on the one hand, and the Seventh, Sixth, and D.C. Circuits, on the other, has now consumed the Second and Third Circuits, both of which offer conflicting interpretations of *Dole*.

A. The Pre-*Dole* Circuit Split

The decision below aptly recognizes the split that has pervaded the Circuits: "While our Circuit has never ruled on the question, the Ninth and Seventh Circuit[s] have come to starkly different conclusions on the application of tiering to sovereign immunity analysis." App. at 8a, n.4 (internal citations omitted). The Seventh Circuit, interpreting what constitutes a "foreign state" under the FSIA, concluded that the "plain language of § 1603(a) defines 'foreign state' broadly." *In re Air Crash Disaster Near Roselawn, Ind.*, 96 F.3d 932, 940 (7th Cir. 1996). Given the realities of modern corporate structures, the court recognized that to limit the definition would yield untoward consequences unintended by Congress, and it accordingly equated a "foreign state" with an "agency or instrumentality of a foreign state": "The use of 'includes' shows Congress' intent to broadly define 'foreign state.'" *Id.*

Bolstering its conclusion, the Seventh Circuit pointed to a critical aspect of the statute:

> [Section] 1603(a)'s definition of "foreign state" applied to all provisions in the Act except § 1608, where it referred only to a foreign sovereign. This distinction is

> again made in 28 U.S.C. § 1611(b) (". . . the property of a foreign state shall be immune from attachment and from execution, if—(1) the property is that of . . . its parent foreign government . . . ."). To limit "foreign state" to "foreign sovereign" or "foreign government" would be to rewrite the Act, which is obviously beyond our role as judges.

Roselawn, 96 F.3d at 940.

In reaching this result, the Seventh Circuit purposefully split with the Ninth, and joined the views of the Sixth and D.C. Circuits. *See Roselawn*, 96 F.3d at 941. The Ninth Circuit articulated the minority position in *Gates v. Victor Fine Foods*, 54 F.3d 1457 (9th Cir. 1995), where it narrowly construed "foreign state." Although § 1603(a) defines a foreign state to "include[] both a political subdivision of a foreign state or an agency or instrumentality of a foreign state," the Ninth Circuit refused to equate "agency or instrumentality" with a "foreign state" based on the use of "includes" rather than "is" in the statutory scheme. *Id.* at 1462. The Ninth Circuit then focused myopically on the "includes" language while largely disregarding the overall context of the statute as subsequently highlighted by the Seventh Circuit.

Although the existence of this split may have influenced the certiorari grant in *Dole*, given the posture of the case as described below, important aspects of the split were not before this Court in *Dole*.

B. This Court's Decision in *Dole*

Faced with that backdrop, when the parties reached the Ninth Circuit in *Patrickson v. Dole Food Co., Inc.*, 251 F.3d 795 (9th Cir. 2001), the subsidiary seeking immunity had to avoid addressing the split between the circuits in light of the binding nature of *Gates*. Therefore, it focused attention on the "other ownership interest" provision in § 1603(b)(2),

rather than upon the statutory meaning of "foreign state" or "organ."

Dole involved a situation where the State of Israel held an interest in the Dead Sea Companies at various times through a chain of other corporate subsidiaries, such that Israel owned a majority of shares in one company, which in turn owned a majority of another company, and so on down to the Dead Sea Companies. The remote subsidiary was not owned by an organ of Israel. The *Dole* case thus presented a classic example of "tiering"—where a subsidiary held by intermediaries sought immunity protection based on the status of a company located several layers above it.

As a result, when the case reached this Court, it largely revolved around the control issue as well as the "majority ownership" prong of § 1603(b)(2). The subsidiary resorted to arguing that a common-sense application of "ownership" meant that because Israel exercised "considerable control" over the remote subsidiary's operations, the Court should disregard corporate form in determining "foreign state" status under the FSIA. *Dole,* 538 U.S. at 477. This Court rejected that argument, holding that the statutory language did not support a "control test," and that formal, direct ownership was required for immunity to apply: "Section 1603(b)(2) speaks of ownership. The Dead Sea Companies urge us to ignore corporate formalities and use the colloquial sense of that term. . . We reject this analysis." *Id.* at 474. "Control and ownership," the Court emphasized, "are distinct concepts." *Id.* at 477. Thus, the Court held that "[a] corporation is an instrumentality of a foreign state under the FSIA only if the foreign state itself owns a majority of the corporation's shares." *Id.* The Court did not, however, proceed to determine the question of what entities qualify as a "foreign state."

In short, this Court in *Dole* focused on the subsidiary's argument that the "majority ownership" prong should be expanded to include the concept of control. It did not focus

on the "organ" aspect of the statute, nor did it elucidate the statutory definition of "foreign state." *Cf.* Joseph W. Hardy, Jr., Note, *Wipe Away the Tiers: Determining Agency or Instrumentality Status Under the Foreign Sovereign Immunities Act*, 31 GA. L. REV. 1121, 1161, 1172 (1997) (expressing concern that if a court ends tiering analysis with "majority ownership" provision, "some legitimate agencies or instrumentalities may nevertheless be denied immunity" and recognizing that "[t]he organ provision gives those entities an alternative route for claiming agency or instrumentality status"). Therefore, this Court's approval of the Ninth Circuit's holding "that a subsidiary of an instrumentality is not itself entitled to instrumentality status," *Dole*, 538 U.S. at 473, must be construed in light of the facts and arguments actually before the Court.

C. The Continuing Circuit Split

Although *Dole* answered one aspect of the split by concluding that indirect ownership could not suffice, it left much unresolved, particularly with respect to the organ prong of § 1603(b)(2). A recent Third Circuit decision amply illustrates the continuing confusion over the meaning of "foreign state" under the FSIA.

In *USX Corp. v. Adriatic Ins. Co.*, 345 F.3d 190 (3d Cir. 2003), *cert. denied*, 124 S. Ct. 1602 (2004), the Republic of Ireland owned a holding company that, in turn, acquired a company known as ICAROM in connection with a bailout. Before the district court, ICAROM initially took the position that it constituted a "foreign state" for FSIA purposes based on tiering. *Id.* at 203-04. In the aftermath of *Dole*, however, ICAROM altered its argument and instead maintained that it qualified as an "organ" of Ireland. The Third Circuit proved receptive to this argument, recognizing that a "flexible approach [to the definition of 'organ'] is particularly appropriate after *Dole*, inasmuch as courts likely now will be asked

to evaluate the possible organ status of a wide variety of entities controlled by foreign states through tiering arrangements and because of the widely differing forms of ownership or control foreign states may exert over entities." *Id.* at 208.

The Third Circuit accordingly refused to "extend[] *Dole*'s antitiering holding to the organ prong of section 1603(b)(2)." *Id.* at 210. As a result, "we are able to consider ownership structure as a factor unto itself [u]nder the organ prong without running afoul of *Dole* even where that structure involves tiering." *Id.* at 211 n.19.[3] This distinction between the organ prong and the majority ownership prong was argued by Petitioner before the Second Circuit, and it is exactly what the Second Circuit declined to follow. *See also id.* at 209 (distinguishing the organ prong from the majority ownership prong).

D. The Second Circuit Deepens the Split

By diminishing the distinction between ownership and organ status, the Second Circuit stretched *Dole* beyond its breaking point in a manner certain to cause foreign relations problems and sow judicial confusion.

Yet the organ-ownership distinction is critical, and it explains why *Dole* does not control the instant case. Unlike *Dole*, in this case there is no "tiering" because Petitioner is owned directly by the KDIC, which is itself synonymous with the Republic of Korea under the FSIA's definitional section.[4] An "organ" of a foreign state is, *inter alia*, part of a foreign state, that is created for a "national purpose," that is con-

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[3] Ultimately, the Third Circuit deemed ICAROM to be an organ of the Republic of Ireland. Although Petitioner's argument is slightly different —that it is majority owned by the FSIA defined foreign state, an organ of the Republic of Korea—under the Third Circuit's analysis, Petitioner would easily fall within the definition of "organ" as well.

[4] There is no dispute that Petitioner satisfies the remaining two prongs of § 1603(b). App. at 6a.

trolled by the foreign state, that has employees that are considered public officials, and that "holds exclusive rights to some right" in the country. *See, e.g., Kelly v. Syria Petroleum Dev. Co.*, 213 F.3d 841, 846-47 (5th Cir. 2000). In other words, an organ of the government is not just a company that happens to be owned by the state, it *is* the state. *Cf. EIE Guam Corp. v. The Long Term Credit Bank of Japan, Ltd.*, 322 F.3d 635, 642 (9th Cir.), *cert. denied*, 124 S. Ct. 533 (2003) ("[An organ] is therefore a 'foreign state' within the meaning of the FSIA and is entitled to exercise the rights afforded foreign states under the FSIA."); *S&S Mach. Co. v. The Romanian Bank for Foreign Trade*, 706 F.2d 411, 414 (2d Cir. 1983) (organ of foreign state was "but a cat's paw of the Romanian government"); App. at 7a (describing KDIC as "a Korean governmental institution"). Therefore, the Second Circuit's characterization of Petitioner as a "second-tier" subsidiary, app. at 9a, is inaccurate: Petitioner had no parent entity (meaning no "tiering" could occur) but was simply owned by the Korean government.

Trying to force Petitioner into a doctrinal test of tiering is accordingly improper, even if the Second Circuit correctly determined that *Dole* forbids all forms of "tiering" (a conclusion disputed by the Third Circuit). Petitioner's argument would therefore not "eviscerate *Dole*," app. at 9a, because *Dole* never addressed the organ prong of § 1603(b)(2). The Second Circuit's fear about permitting infinite tiering might be justified in connection with Hanvit Bank because of the intermediate subsidiary situated between it and the KDIC, but it has no place with respect to a directly owned entity such as Petitioner. And by lumping the two banks together for analytical purposes, the Second Circuit betrayed a disregard for the crucial differences between the two.

Near the end of its opinion, the Second Circuit turned to the statutory language as a means to justify its result. App. at 10a. Yet this tour only reveals the infirmities of its analysis.

Electing to follow the Ninth Circuit (and implicitly rejecting the Sixth, Seventh, and D.C. Circuits), the court placed great weight on the fact that the FSIA provides that a "foreign state . . . *includes* a political subdivision of a foreign state or an agency or instrumentality of a foreign state. . ." App. at 10a (quoting 28 U.S.C. § 1603(a); emphasis in original). Notably, the court did not rely on *Dole* for this point, highlighting the fact that *Dole* does not speak to it.

Even the Ninth Circuit appreciates that "the Act's legislative history suggests that Congress intended the terms 'organ' and 'agency or instrumentality' to be read broadly." *Gates*, 54 F.3d at 1460. By refusing to identify an organ as the foreign state, however, the Second Circuit exhibited insufficient regard for Congressional intent and the language of the statute.

Moreover, the Second Circuit overlooked an irreconcilable tension in its reasoning: Congress expressly stated that the definition of "foreign state" should apply to all provisions of the FSIA "*except section 1608*." 28 U.S.C. § 1603 (emphasis added). Section 1608 is a service of process provision which, tellingly, treats an "agency or instrumentality" differently from a "foreign state" or "political subdivision" of a foreign state. Section 1608 thus makes precisely the distinction that is forbidden in the rest of the statute. Congress wanted to distinguish "foreign states" from their "agencies and instrumentalities" when it came to serving process, but to treat them as one and the same for all other purposes. *See, e.g., Roselawn,* 96 F.3d at 940.

Contrary to the Second Circuit's position, "[t]he use of 'includes' shows Congress' intent to broadly define 'foreign state.' This is consistent with the statement in the legisla tive history that instrumentalities could assume 'a variety of forms' (H. Rep. at 6614). . ." *Roselawn*, 96 F.3d at 940.

This split is real and deepening, and it warrants this Court's attention.

II. THE QUESTION PRESENTED IS IMPORTANT AND IMPLICATES INTERNATIONAL RELATIONS AND COMITY

The Second Circuit's error is not an isolated one confined to the parties; rather, it carries profound consequences for international relations. As the Third Circuit appreciated, the danger of adopting a narrow definition of "foreign state" similar to that subscribed to by the Second Circuit below is that it "would pose potential foreign relations problems." *USX*, 345 F.3d at 208. It elaborated: "This narrow a construction of the term 'organ' could have potentially adverse effects on foreign relations insofar as foreign states may place significant national value in an entity yet not directly control its daily operations." *Id.* at 209.

Such concerns are heightened in this case, in light of the undisputed fact recognized by the district court that the treasury of the Republic of Korea would be affected by a judgment against Petitioner. App. at 17a. Comity in the global community was one of the central motivating factors that led Congress to promulgate the FSIA—"to minimize irritations in foreign relations arising out of . . . litigation." Letter from Robert S. Ingersoll, *in* H. REP. 94-1487, *reprinted in* 1976 U.S.C.C.A.N. 6604, 6634; *see also USX*, 345 F.3d at 207 ("A primary purpose of the FSIA is to make it difficult for private litigants to bring foreign governments into court, thereby avoiding affronting them."). And these concerns are particularly acute in the context of a Korean entity owned by the Korean government, when the latter will bear responsibility for the liability of the former: "Comity considerations, which generally weigh in favor of extending immunities, are stronger for companies or subsidiaries incorporated under the laws of the sovereign they serve." Abigail Hing Wen, Note, *Suing the Sovereign's Servant: The Implications of Privatization for the Scope of Foreign Sovereign Immunities*, 103 COLUM. L. REV. 1538, 1572 (2003).

The questions concerning the meaning of "foreign state" under the FSIA will be recurring ones confronted by the lower federal courts absent this Court's intervention. In the modern global economy, foreign states employ "a wide variety of entities controlled by foreign states through tiering arrangements" and utilize "widely differing forms of ownership or control" over corporate entities. *USX*, 345 F.3d at 208. Analyzing these arrangements based on conflicting views of the meaning of "foreign state" will thwart the certainty that Congress intended to provide private litigants and foreign states alike.

CONCLUSION

The decision below highlights the unresolved issues in a circuit split that only promises to deepen. Especially since such issues implicate foreign affairs and comity, they beckon this Court's scrutiny. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 3, 2004

APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 03-7861(L), 03-7871(CON),
Docket No. 03-7863(L), 03-7893(CON)

GARY B. FILLER, trustee of the TRA Rights Trust and LAWRENCE PERLMAN, trustee of the TRA Rights Trust,
Plaintiffs-Appellees,

v.

HANVIT BANK and CHOHUNG BANK,
Defendants-Appellants,

SHINHAN BANK,
Defendant.

JANET BAKER, JAMES BAKER, JKBAKER, LLC, and JMBAKER, LLC,
Plaintiffs-Appellees,

v.

HANVIT BANK and CHOHUNG BANK,
Defendants-Appellants,

SHINHAN BANK,
Defendant.

April 2, 2004, Argued
August 6, 2004, Decided

Before: JACOBS, STRAUB, B.D. PARKER, *Circuit Judges*.

OPINION

B. D. PARKER, *Circuit Judge*:

Defendants-appellants Hanvit Bank and Chohung Bank (the "Banks") appeal from interlocutory orders of the United States District Court for the Southern District of New York (Cedarbaum, J.) concluding that the Banks were not "foreign states" entitled to immunity under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. §§ 1602, *et seq*. The orders vacated previous ones granting immunity under the FSIA with respect to claims brought against them by Gary Filler and Lawrence Perlman (the "Filler plaintiffs") and Janet and James Baker (the "Baker plaintiffs). The vacatur occurred as a consequence of an intervening Supreme Court decision, *Dole Food Co. v. Patrickson*, 538 U.S. 468, 477, 155 L. Ed. 2d 643, 123 S. Ct. 1655 (2003), which held that a foreign state must itself own a majority of a corporation's shares if the corporation is to be deemed an instrumentality of the state under the FSIA.[1] We affirm.

I. BACKGROUND

The Filler plaintiffs are trustees of the TRA Rights Trust, which is the successor-in-interest of Seagate Technology, Inc. ("Seagate") and holds all claims arising out of Seagate's acquisition in June 2000 of $170 million in stock of Lernhout & Hauspie Speech Products, N.V. ("L&H"), a Belgian software company. The Baker plaintiffs owned more than $ 300 million of L&H stock, which they obtained in June 2000 in a stock swap for their principal interest in Dragon Systems,

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[1] There are two cases on appeal: *Baker v. Hanvit Bank*, No. 03-7863(L), and *Filler v. Hanvit Bank*, No. 03-7861(L). Because they present the same legal issue, we resolve them together in this opinion.

Inc. A few months later, L&H was implicated in a multi-billion dollar fraud permeating their worldwide operations. The fraud, which was perpetrated by senior management of L&H along with outside auditors and others in the United States and Korea, involved reporting hundreds of millions of dollars of nonexistent revenue from contracts with related parties or fictitious customers. After the fraud was exposed, more than one-third of the revenue reported by L&H for the 1998-2000 period was reversed, including the entirety of the $ 160 million of revenue reported by the firm's Korean operations in 1999 and 2000. This fraud has been the subject of an SEC as well as a criminal investigation and multiple arrests by Belgian authorities. Public exposure of the fraud caused a loss of 95% of L&H's market capitalization—about $ 9 billion—including the value of the stock held by the appellees.

Chohung Bank and Hanvit Bank are both commercial banks organized under the laws of Korea with headquarters in Seoul. Both banks were private entities prior to January 1999 when, because of severe financial problems, they received substantial capital infusions from the Korean Deposit Insurance Corporation (KDIC). The KDIC is a Korean governmental institution created by the Korea's Depositor Protection Act and a presidential decree. Under its enabling statute, the KDIC exists as a "special legal entity" for the purpose of operating a deposit insurance system. The KDIC is run by the Korean Ministry of Finance and the Economy of the Republic of Korea. At the time of the filing of these actions the KDIC directly owned 80% of the shares of Chohung Bank[2] and 100% of the shares of Woori Finance Holdings Co., Ltd., which in turn owned 100% of the shares of Hanvit Bank. Since the filing of the actions, the KDIC has sold Chohung Bank to a private entity, and Hanvit Bank is

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[2] The remaining 20 was owned by financial institutions, securities firms, private corporations, and individual shareholders.

expected to emerge as a private entity in the near future. In their complaints, the Baker and Filler plaintiffs allege that Chohung and Hanvit (along with Shinhan Bank, a party not appealing here) were involved in the fraud perpetrated by L&H, and that the two banks actively made material misrepresentations to their independent auditors about the source and amounts of L&H's revenue.

The Filler plaintiffs' action was filed against Chohung and Hanvit in October 2001 while the Baker plaintiffs' complaint was filed against the two banks a year later. In February 2003, the District Court dismissed the Filler plaintiffs' claims against Chohung and Hanvit on the grounds that the Banks enjoyed sovereign immunity under the FSIA, and in March dismissed the Baker plaintiffs' claims against the Banks on the same ground. Following the Supreme Court's decision in *Dole Food* in April 2003, the plaintiffs in both cases successfully moved for reconsideration. The District Court vacated its previous orders dismissing the claims against Hanvit and Chohung, finding that *Dole Food* precluded sovereign immunity where, as here, government ownership of the defendant corporations is indirect. The Banks appeal, and we affirm.

II. DISCUSSION

A. Standard of Review

We have appellate jurisdiction under the collateral order doctrine, which allows an immediate appeal from an order denying immunity under the FSIA. *Transatlantic Shiffahrtskontor GmbH v. Shanghai Foreign Trade Corp.*, 204 F.3d 384, 387 (2d Cir. 2000); *Drexel Burnham Lambert Group Inc. v. Comm. of Receivers for Galadari*, 12 F.3d 317, 324 (2d Cir. 1993). We review a district court's legal determinations regarding its subject matter jurisdiction, such as whether sovereign immunity exists, *de novo* while reviewing

its factual findings for clear error. *Abrams v. Societe Nationale des Chemins de Fer Francais*, 332 F.3d 173, 176 (2d Cir. 2003).

B. Sovereign Immunity

The FSIA is "the sole basis for obtaining jurisdiction over a foreign state in the courts of this country." *Saudi Arabia v. Nelson*, 507 U.S. 349, 355, 123 L. Ed. 2d 47, 113 S. Ct. 1471 (1993) (quotation marks and citation omitted); *Robinson v. Gov't of Malay*, 269 F.3d 133, 138-39 (2d Cir. 2001). The FSIA provides that: "subject to existing international agreements to which the United States is a party at the time of enactment of this Act a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter."[3] 28 U.S.C. § 1604. The Act further provides:

> For purposes of this chapter—
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> > (a) A "foreign state", except as used in section 1608 of this title, includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b).
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> > (b) An "agency or instrumentality of a foreign state" means any entity—
> >
> > > (1) which is a separate legal person, corporate or otherwise, and

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[3] Sections 1605 and 1607 of Title 28 provide some exceptions to the general rule of sovereign immunity—for example, when the foreign state waives immunity, when the suit arises out of commercial activity carried out in the United States or commercial activity causing a direct effect in the United states, when the suit addresses a violation of property rights in contravention of international law, and when the suit consists of counterclaims made against a foreign state that initiates litigation. 28 U.S.C. §§ 1605, 1607. While the plaintiffs-appellees did raise the commercial activity exception below, that argument is not implicated on appeal.

> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
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> (3) which is neither a citizen of a State of the United States as defined in section 1332(c) and (d) of this title nor created under the laws of any third country.

28 U.S.C. § 1603. There is no dispute that both Chohung and Hanvit satisfy the first and third criteria of § 1603(b)'s test for "agency or instrumentality" status—they are both separate legal entities and are neither citizens of a state of the United States nor created under the laws of a third country.

Further, there is no dispute that the KDIC is an organ of a foreign state—South Korea—under § 1603(b)(2). *Filler v. Hanvit Bank*, 247 F. Supp. 2d 425, 428 (S.D.N.Y. 2003) (Filler I). Although there is no specific test for "organ" status under the FSIA, various factors are relevant:

> (1) whether the foreign state created the entity for a national purpose;
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> (2) whether the foreign state actively supervises the entity;
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> (3) whether the foreign state requires the hiring of public employees and pays their salaries;
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> (4) whether the entity holds exclusive rights to some right in the [foreign] country; and
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> (5) how the entity is treated under foreign state law.

Kelly v. Syria Shell Petroleum Dev. B.V., 213 F.3d 841, 846-47 (5th Cir. 2000) (quotation marks and citation omitted) (alteration in original); *see Corporacion Mexicana de Servicios Maritimos, S.A.*, 89 F.3d 650, 655 (9th Cir. 1996). The District Court correctly concluded that the KDIC is an

organ of a foreign state because the KDIC was formed by statute (the Korea Depositors Protection Act) and presidential decree, it performs functions traditionally performed by the government (protecting depositors and promoting financial stability), has its directors are appointed by the Ministry of Finance and Economy; its president appointed by the President of the Republic of Korea; and many of its operations overseen by the Ministry of Finance and Economy. *Filler I*, 247 F. Supp. 2d at 428.

The only question is whether the Banks satisfy the second criteria for agency or instrumentality status—namely, whether they are "organ[s] of a foreign state" *or* have a majority of their shares owned by "a foreign state or political subdivision thereof." 28 U.S.C. § 1603(b). The Banks contend that they do, arguing that once we determine that the KDIC is an organ of the government of South Korea, they automatically become agencies or instrumentalities of the state because the majority of their stock is owned by the KDIC. *See In re Air Crash Disaster near Roselawn*, 96 F.3d 932, 939-41 (7th Cir. 1996) (accepting this tiering theory of sovereign immunity). *But see Gates v. Victor Fine Foods*, 54 F.3d 1457, 1461-63 (9th Cir. 1995) (rejecting the same). In other words, the Banks argue that since the KDIC is an organ and therefore an agency or instrumentality of a foreign state, it is also a "foreign state" by virtue of § 1603(a)'s definition of a foreign state as "includ[ing]" its agencies or instrumentalities. And because the KDIC owns the majority of their shares, the two Banks contend that they are agencies or instrumentalities of a foreign state by virtue of § 1603(b)'s ownership prong. Put another way, the Banks argue the transitive: (1) foreign state means agency or instrumentality; (2) agency or instrumentality means organ or majority-owned corporation; (3) therefore foreign state means organ or majority-owned corporation; and (4) therefore, majority-owned corporations of an organ are majority-owned corporations of a foreign state.

We note that Chohung and Hanvit claim to be majority-owned corporations of a foreign state for purposes of FSIA analysis even though Chohung is a second-tier subsidiary and Hanvit is a third-tier subsidiary. Accepting their analysis would permit an *infinite* number of subsidiaries to enjoy sovereign immunity. Each subsidiary becomes an agency or instrumentality, and therefore the "foreign state," for purposes of assessing its majority ownership of the next subsidiary in line.

The District Court initially accepted the Banks' argument, holding that such tiering was allowed and that Chohung and Hanvit were entitled to foreign sovereign immunity by virtue of KDIC's ownership interest in them. *Filler I*, 247 F. Supp. 2d at 429.[4] The Supreme Court then addressed tiering under the FSIA in *Dole Food*, affirming the Ninth Circuit and noting that "the Court of Appeals resolved the question of the FSIA's applicability by holding that a subsidiary of an instrumentality is not itself entitled to instrumentality status. Its holding was correct." 538 U.S. at 473. Because the companies claiming immunity were "separated from the [foreign state] by one or more intermediate tiers," the Court found that these companies "were not instrumentalities of [the foreign state] under the FSIA at any time." *Id.* at 473-74. The

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[4] While our Circuit has never ruled on the question, *Filler*, 247 F. Supp. 2d at 428, the Ninth and Seventh Circuit have come to starkly different conclusions on the application of tiering to sovereign immunity analysis. In *Gates*, 54 F.3d 1457, the court held that although one defendant was an "organ" (and thus an agency or instrumentality) of Canada, the organ's majority ownership of a subsidiary did not similarly make that subsidiary an instrumentality. *Id.* at 1462-63. In contrast stood the Seventh Circuit, which in *Roselawn*, 96 F.3d 932, held that "tiering" was allowed for FSIA purposes, rejecting the Ninth Circuit's reasoning in favor of a broad interpretation of foreign state, and ruling that an instrumentality *was*, by definition, a foreign state, thus turning its subsidiaries—all tiers of them—into instrumentalities subject to the protection of the FSIA. *Id.* at 940-41.

Court relied on the elementary principle of corporate law that corporations are distinct from their shareholders to conclude that "only direct ownership of a majority of shares by the foreign state satisfied the statutory requirement" of majority ownership. *Id.* at 474. In light of this ruling, the District Judge, acting on a motion for reconsideration under Fed. R. Civ. P. 54(b), revised and vacated the earlier dismissal of plaintiffs' claims, holding that the Banks were not entitled to sovereign immunity. *Filler v. Hanvit Bank*, No. 01 Civ. 9510, 2003 U.S. Dist. LEXIS 12836 (S.D.N.Y. July 25, 2003); *Baker v. Hanvit Bank*, No. 02 Civ. 8251, 2003 U.S. Dist. LEXIS 12837 (S.D.N.Y. July 24, 2003).

While *Dole Food* rejected the contention that § 1603(b)(2)'s "majority ownership" clause allowed for the tiering of corporate subsidiaries, such that each could avail itself of sovereign immunity under the FSIA, 538 U.S. at 473, the Banks advance a somewhat different argument in this case—namely, that an "organ" under the first half of § 1603(b)(2) that is an "agency or instrumentality" is also, by definition, a "foreign state" under § 1603(a), and that its subsidiary is therefore *directly* owned by a foreign state and entitled to sovereign immunity. Accepting the Banks' proposed distinction would, however, eviscerate *Dole Food.* Rather than claiming a subsidiary is entitled to immunity because of successive majority ownership up the chain of control, defendants would simply claim that at each level, majority ownership grants agency or instrumentality status, designation as a foreign state, and, therefore, sovereign immunity. Such a result would be incompatible with the purpose of the FSIA, which is to grant governmental, not private corporate immunity, and, in any event, would reflect infidelity to the Supreme Court's reasoning in *Dole Food.* The fact that Chohung is a second-tier subsidiary while Hanvit is a third-tier subsidiary only makes the problem more apparent because it requires an additional finding that Woori is an agency or instrumentality and therefore a foreign state,

thus conferring immunity on Hanvit. Such a result is incompatible with *Dole Food*. The Supreme Court made it unmistakably clear that "a subsidiary of an instrumentality is not itself entitled to instrumentality status," 538 U.S. at 473, and that "only *direct* ownership of a majority of shares by the foreign state satisfies the statutory requirement." *Id.* at 474 (emphasis added).

The Banks' argument fails for a number of other reasons as well. First, the statutory language of § 1603(a) makes clear that a "foreign state . . . *includes* a political subdivision of a foreign state or an agency or instrumentality of a foreign state . . . ." 28 U.S.C. § 1603(a) (emphasis added). This statement is not equivalent to saying that a foreign state *is* or *is defined as* an agency or instrumentality. *Gates*, 54 F.3d at 1462. While these latter terms would suggest equivalency between the foreign state and the agencies and instumentalities, the use of the term "includes" implies that agencies and instrumentalities, as well as political subdivisions, are subsumed within the "foreign state." Thus, a proper understanding of the term "includes" does not support the notion of recursive tiering. Once an entity is determined to be an agency or instrumentality, it is deemed *part of* the foreign state but it does not *become* the foreign state and, therefore, cannot confer agency or instrumentality status on corporate entities further down the chain of ownership.

Further, as the Ninth Circuit recognized, if Congress intended "foreign state" to mean "agency or instrumentality" as appellants urge, it must also have meant for "foreign state" to mean "political subdivision" by the terms of § 1603(a). *Id.* However, this latter proposition clearly cannot be the case as the rest of the statute repeatedly distinguishes between foreign states and political subdivisions. For example, § 1603(b)(2) states that an entity must be "an organ of a foreign state or political subdivision thereof," in order to be accorded instrumentality status. *Id.* (noting this contradiction

in more detail). If we were to accept the Banks' argument, we would render the reference to political subdivisions in these provisions redundant, a result that is to be avoided in statutory construction. *Babbitt v. Sweet Home Chapter of Cmtys. for a Great Or.*, 515 U.S. 687, 698, 132 L. Ed. 2d 597, 115 S. Ct. 2407 (1995) (applying canon of interpretation disfavoring readings of statutes that render statutory language surplusage).

Additionally, our interpretation is consistent with the restrictive theory of sovereign immunity codified in the FSIA. *Republic of Austria v. Altmann*, 159 L. Ed. 2d 1, 124 S. Ct. 2240, 2249 (2004); *Verlinden B.V. v. Cent. Bank of Nig.*, 461 U.S. 480, 486-89, 76 L. Ed. 2d 81, 103 S. Ct. 1962 (1983). The restrictive theory provides that "a state is immune from the jurisdiction of foreign courts as to its sovereign or public acts (*jure imperii*), but not as to those that are private or commercial in character (*jure gestionis*)." *Nelson*, 507 U.S. at 359-60. Finally, we note that while the KDIC serves a public function in ensuring the stability of the South Korean banking system, the same cannot be said of the defendant Banks, which have conceded that they have reverted or are in the process of reverting back to private ownership. Thus, denial of sovereign immunity to Chohung and Hanvit would not undermine a public function of the government of Korea and basically impacts the private commercial interests of the Banks.

III. CONCLUSION

For these reasons, we affirm the District Court's denial of defendant-appellants' motions to dismiss on the ground of sovereign immunity.

APPENDIX B

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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01 Civ. 9510 (MCG), 02 Civ. 8251 (MGC)

GARY B. FILLER and LAWRENCE PERLMAN, Trustees of the TRA Rights Trust,
Plaintiffs,

-against-

HANVIT BANK, SHINHAN BANK, and CHOHUNG BANK,
Defendants.

JANET BAKER and JAMES BAKER, JKBAKER LLC and JMBAKER LLC,
Plaintiffs,

-against-

HANVIT BANK, SHINHAN BANK, and CHOHUNG BANK,
Defendants.

July 23, 2003, Decided
July 25, 2003, Filed

MIRIAM GOLDMAN CEDARBAUM, *United States District Judge*.

CEDARBAUM, *J*.

OPINION

The Filler and Baker plaintiffs move under Fed. R. Civ. P. 54(b) for an order revising and vacating my ruling in *Filler v. Hanvit Bank*, 247 F. Supp. 2d 425, 2003 WL 660849

(S.D.N.Y. 2003)*, in light of the Supreme Court's recent decision in *Dole Food Co. v. Patrickson*, 155 L. Ed. 2d 643, ___ U.S. ___, 123 S. Ct. 1655 (April 22, 2003). In Filler, I held that Chohung Bank was immune from suit as a foreign sovereign because a majority of its shares were owned by the KDIC, an organ of the Korean government. In Dole Food, the State of Israel owned a majority of shares in a corporation which in turn owned a majority of shares in the defendant, another corporation. The Court held that "only direct ownership of a majority of shares by the foreign state satisfies the statutory requirement" for sovereign immunity, Therefore, I vacate my earlier orders and hold that Chohung Bank is not a foreign sovereign within the meaning of the *Foreign Sovereign Immunities Act*.

SO ORDERED.

DATED: July 23, 2003

/s/ Miriam Goldman Cedarbaum
United States District Judge

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* The Baker plaintiffs move to revise and vacate my order in the Baker action dated March 21, 2003.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

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01 Civ. 9510 (MGC)

GARY B. FILLER and LAWRENCE PERLMAN,
Trustees of the TRA Rights Trust,
Plaintiffs,

-against-

HANVIT BANK, SHINHAN BANK, and CHOHUNG BANK,
Defendants.

February 27, 2003, Filed

MIRIAM GOLDMAN CEDARBAUM, *United States District Judge*.

Cedarbaum, *J*.

OPINION

Plaintiffs Filler and Perlman are trustees of the TRA Trust, the sole successor in interest to Seagate Technology, Inc. ("Seagate"). This action arises out of the transfer by Seagate of its shares in Dragon Systems, Inc. to Lernout & Hauspie Speech Products NV ("L&H Belgium"), in exchange for shares in L&H Belgium. That transaction took place on June 7, 2000. Defendants are three Korean banks which plaintiffs allege engaged in a scheme to defraud investors in the shares of L&H Belgium by entering into sham agreements with L&H Belgium's Korean subsidiary, Lernout & Hauspie Korea ("L&H Korea"), which enabled L&H Belgium to inflate its revenues and assets. Plaintiffs assert six claims: (1) securities fraud in violation of Section 10(b) of the Securities Exchange Act and SEC Rule 10b-5; (2) racketeering in

violation of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962(c); (3) conspiracy to engage in racketeering in violation of *RICO*, 18 U.S.C. § 1962(d); (4) common law fraud; (5) aiding and abetting common law fraud; and (6) conspiracy to defraud. All three defendants move to dismiss the claims against them under Fed. R. Civ. P. 12(b)(6) for failure to state a claim and Fed. R. Civ. P. 9(b) for failure to plead fraud with particularity. Additionally, defendants Hanvit Bank ("Hanvit") and Chohung Bank ("Chohung") move to dismiss for lack of subject matter jurisdiction under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1602, *et seq.*

For the reasons that follow, defendants' motions to dismiss under Rule 9(b) are granted, with leave to plaintiffs to amend the complaint with respect to Shinhan Bank ("Shinhan") by March 31, 2003. The claims against Hanvit and Chohung are dismissed under the Foreign Sovereign Immunities Act.

Lack of Jurisdiction Under the FSIA

As an initial matter, defendants Hanvit and Chohung argue that the court lacks jurisdiction over them because they are foreign states within the meaning of the FSIA. 28 U.S.C. § 1604 provides immunity to "foreign states" subject to certain exceptions set forth in sections 1605 through 1607. Section 1603(a) provides, in relevant part, that "[a] 'foreign state' . . . includes a political subdivision of a foreign state or an agency or instrumentality of a foreign state as defined in subsection (b)." Subsection (b) states:

> An 'agency or instrumentality of a foreign state' means any entity—
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> (1) which is a separate legal person, corporate or otherwise, and

> (2) which is an organ of a foreign state or political subdivision thereof, or a majority of whose shares or other ownership interest is owned by a foreign state or political subdivision thereof, and
>
> (3) which is neither a citizen of a State of the United States . . . nor created under the laws of any third country. 28 U.S.C. § 1603(b).

A defendant need make only a prima facie showing that it is a foreign state. Once a defendant makes such a showing, it is presumptively immune and the burden shifts to the plaintiff to show that a statutory exception to immunity applies. *See* Cargill Int'l *SA v. M/T Pavel Dybenko*, 991 F.2d 1012, 1016 (2d Cir. 1993).

Chohung and Hanvit are corporations organized under the laws of the Republic of Korea, as required by the first and third prongs of the definition of a foreign state. The main dispute between the parties with respect to immunity is whether Chohung and Hanvit meet the second prong of the definition because they are owned by the Korean government through the Korean Deposit Insurance Corporation ("KDIC").[1] The judges of this court are split on whether such "tiering" of entities is allowed under the FSIA. *Compare Musopole v. South African Airways*, 172 F. Supp. 2d 443, 445-47 (S.D.N.Y. 2001) (holding tiering permissible); Lehman Bros. Commercial Corp. v. Minmetals Int'l Non-Ferrous Metals Trading Co., 169 F. Supp. 2d 186, 190-91 (S.D.N.Y. 2001) (same); *Parex Bank v. Russian Savings Bank*, 81 F. Supp. 2d 506, 507 (S.D.N.Y. 2000) (same); *with Bank of China v. NBM*, 2002 U.S. Dist. LEXIS 9468, 2002 WL 1072235 (S.D.N.Y. 2002) (holding tiering imper-

[1] The KDIC owned more than 70% of the stock of each bank at the time of the allegedly fraudulent conduct of these banks, as well as at the time this action was commenced. Moreover, the KDIC continues to own the same stock interest in both Chohung and Hanvit.

missible); In re Ski Train Fire in *Kaprun, Austria on November 11, 2000*, 198 F. Supp. 2d 420 (S.D.N.Y. 2002) (same). Determination of this issue turns on whether the term "foreign state" under Section 1603(b)(2) includes "agencies or instrumentalities of a foreign state" or is limited to foreign nations themselves. The Second Circuit has not yet ruled on this question.

Those judges allowing tiering base this conclusion on an analysis of the legislative history and purpose of the FSIA. Judges holding tiering impermissible have attempted to read the ambiguity out of the words of Section 1603, and are also concerned that a foreign government's interest in a defendant might become very remote if tiering is taken to its furthest extremes. It is important to note that in this case, the Korean government owns a large majority of the shares of Chohung and Hanvit. While this ownership is through an intermediate entity, the KDIC, the government's ownership interest in the banks is not diluted. The KDIC was established by a Korean statute—the Depositors Protection Act. It performs a function traditionally performed by governments: "to contribute to protecting depositors and maintaining the stability of the financial system by efficiently operating a deposit insurance system in order to cope with a situation in which a financial institution is unable to pay its depositors due to its bankruptcy." Depositors Protection Act, Article 1 (translated). Directors of the KDIC are appointed by the Korean Ministry of Finance and Economy and the president of the KDIC is appointed by the President of the Republic of Korea. The Ministry of Finance and Economy oversees many of the KDIC's operations. Thus, the KDIC is an "organ" of the Korean government within the meaning of Section 1603(b)(2) and it would appear that the treasury of the Republic of Korea would be affected by a judgment against banks owned by the KDIC.

This is not the hypothetical case in which a foreign government owns only 51% of the intermediate entity and the intermediate entity, in turn, owns 51% of the defendant. In this case, an organ of the Korean government owns more than 70% of Chohung and Hanvit. I adopt the reasoning of my colleagues who permit tiering. Because the statutory language is ambiguous, I do not subscribe to efforts to treat the words as if they were crystals. Defendants have therefore satisfied their burden of making a prima facie showing that they are foreign states within the meaning of Section 1603.

Exception to Immunity

Plaintiffs seek to overcome the prima facie showing made by Chohung and Hanvit. They argue that these banks lose their immunity under the "commercial activity" exception of 28 U.S.C. § 1605(a)(2). That section provides:

> (a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case-
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> . . .
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> (2) in [**8] which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States.

It is not disputed that the acts of Chohung and Hanvit complained of constitute a "commercial activity." However, it is also undisputed that the commercial activity took place solely in Korea. Therefore, this action would not fall under the commercial activity exception unless the acts complained

of caused a "direct effect" in the United States. "An effect is direct if it follows as the immediate consequence of the defendant's activity." *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 112 S. Ct. 2160, 119 L. Ed. 2d 394 (1992) (internal quotations omitted). In this case, the claims against Chohung and Hanvit as primary wrongdoers arise out of allegedly false statements made by the banks to L&H Belgium's auditors in Korea. These statements are alleged to have been incorporated into audit reports and transmitted by the auditors to L&H Belgium and later to the plaintiffs in the form of financial statements provided by L&H Belgium to Seagate in connection with Seagate's acquisition of securities in the Belgian company. These statements did not have a direct effect in the United States where Seagate received the stock of L&H Belgium. Plaintiffs' financial loss is too remote from the acts of the Korean banks' in Korea to be considered the "immediate consequence" of such acts. The claims against Chohung and Hanvit of aiding and abetting and conspiracy arise out of allegedly fraudulent banking agreements entered into in Korea between the banks and L&H Korea. These agreements are even more remote from the acquisition by Seagate of the stock of L&H Belgium, and cannot be said to have had an immediate consequence in the United States.

Because plaintiffs have not shown that the commercial activities of Chohung and Hanvit in Korea had a direct effect in the United States, the claims arising out of those activities do not fall within the commercial activity exception to immunity. Therefore, the claims against Chohung and Hanvit are dismissed for lack of subject matter jurisdiction under the FSIA.

Failure to Plead Fraud with Particularity

Although the claims against Chohung and Hanvit are dismissed for lack of subject matter jurisdiction, the following analysis of the plaintiffs' claims applies to the claims made

against all three defendants. Plaintiffs concede that it is appropriate to apply the law of New York to defendants' motions to dismiss. Therefore, I analyze plaintiffs' common law claims under New York law.

Federal Securities Fraud and Common Law Fraud Claims

To state a claim under Section 10(b) or Rule 10b-5, "plaintiffs must prove that [defendants] (1) made misstatements or omissions of material fact; (2) with scienter; (3) in connection with the purchase or sale of securities; (4) upon which plaintiffs relied; and (5) that plaintiffs' reliance was the proximate cause of their injury." *In re Int'l Bus. Machs. Corporate Sec. Litig.*, 163 F.3d 102, 106 (2d Cir. 1998). In order to state a common law fraud claim under New York law, a plaintiff must allege: "(1) the defendant made a material false representation; (2) the defendant intended to defraud the plaintiff thereby; (3) the plaintiff reasonably relied upon the representation; and (4) the plaintiff suffered damage as a result of such reliance." *Boule v. Hutton*, 138 F. Supp. 2d 491 (S.D.N.Y. 2001).

Rule 9(b) requires a party averring fraud or mistake to state with particularity "the circumstances constituting [the] fraud or mistake." Fed.R.Civ.P. 9(b). The "particularity requirement" contained in Rule 9(b) is substantial. *Rich v. Maidstone Financial, Inc.*, 2002 U.S. Dist. LEXIS 24510, 2002 WL 31867724, (S.D.N.Y. 2002). "[A] complaint must adequately specify the statements it claims were false or misleading, give particulars as to the respect in which plaintiff contends the statements were fraudulent, state when and where the statements were made, and identify those responsible for the statements." *Cosmas v. Hassett*, 886 F.2d 8, 11 (2d Cir. 1989)); see also *DiVittorio v. Equidyne Extractive Indus., Inc.*, 822 F.2d 1242, 1247 (2d Cir. 1987) Additionally, when fraud is alleged against multiple defendants, a plaintiff must set forth separately the acts complained

of as to each defendant. *Rich*, 2002 U.S. Dist. LEXIS 24510, 2002 WL 31867724 at *10 (internal quotations omitted). To meet the pleading requirements of Rule 9(b), a complaint may not simply "clump[] defendants together in vague allegations." Id. (quoting *In re Blech Securities Litigation*, 928 F. Supp. 1279, 1294 (S.D.N.Y. 1996). Rule 9(b) also requires a plaintiff to adequately allege that the defendant's statements were the proximate cause of the plaintiff's injuries. *Spencer Trask Software and Information Services LLC v. RPost Intern. Ltd.*, 2003 U.S. Dist. LEXIS 946, 2003 WL 169801, *21 (S.D.N.Y. 2003).

In this case, from the allegations of the complaint, it is impossible to tell whether any of the bank transactions vaguely described constitute fraud, and if so, who was the object of the fraud. The acquisition of securities at issue took place on June 7, 2000. For the plaintiffs to allege reliance, as required for actionable fraud under both federal and common law, plaintiffs must allege with particularity that defendants made false statements prior to that date. Here, plaintiffs allege that defendants made "false confirmations" in Korea to L&H Belgium's auditors that loans to L&H Korea were without recourse, when in fact they were with recourse. But plaintiffs have not specified a confirmation by any defendant that was made prior to the acquisition complained of or shown to Seagate before its acceptance of stock of L&H Belgium.

For the same reasons, the amended complaint does not allege with particularity that defendants made any statements that proximately caused plaintiffs' injuries or made "in connection with" the June 7, 2000 transaction as required by Section 10(b) of the Exchange Act.

Common Law Aiding and Abetting and Conspiracy Claims

Plaintiffs' claims of aiding and abetting common law fraud and conspiracy to defraud are subject to the same pleading requirements under Rule 9(b) as their claims of common law

fraud. *See Spira v. Curtin*, 2001 U.S. Dist. LEXIS 7288, 2001 WL 611386, *4 (S.D.N.Y. 2001); *Renner v. Chase Manhattan Bank*, 2000 U.S. Dist. LEXIS 8552, 2000 WL 781081, *5 (S.D.N.Y. 2000). In order to plead the elements of aiding and abetting fraud under New York law, plaintiffs must allege with particularity facts showing (1) the existence of a fraud; (2) defendants' knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission. *Wight v. Bankamerica Corp.*, 219 F.3d 79, 91 (2d Cir. 2000). "In alleging the requisite 'substantial assistance' by the aider and abettor, the complaint must allege that the acts of the aider and abettor proximately caused the harm to the [plaintiff] on which the primary liability is predicated." *Bloor v. Carro, Spanbock, Londin, Rodman & Fass*, 754 F.2d 57, 62 (2d Cir. 1985). "Allegations of a 'but for' causal relationship are insufficient." *Id.* at 63. Aider and abettor liability will not attach where the injury was not a direct or reasonably foreseeable result of the defendant's conduct. *Id.* Under New York law, an allegation of conspiracy to defraud does not excuse a plaintiff from pleading with particularity facts showing an underlying fraud claim. Additionally, conspiracy to defraud requires: "(1) an agreement among two or more parties, (2) a common objective, (3) acts in furtherance of the objective and (4) knowledge." *Diamond State Ins. Co. v. Worldwide Weather Trading LLC*, 2002 U.S. Dist. LEXIS 24023, 2002 WL 31819217 (S.D.N.Y. 2002).

Plaintiffs allege that the primary fraud that defendants aided and abetted and/or conspired to commit was the issuance of false financial statements by L&H Belgium. From the allegations of the complaint, it is impossible to decipher the connection between defendants' agreements with L&H Korea, and the issuance of false financial statements by L&H Belgium. Therefore, with respect to plaintiffs' aiding and abetting claims, plaintiffs have failed to plead with particularity how defendants provided substantial assistance to

L&H Belgium in connection with L&H Belgium's issuance of the false financial statements and how that conduct proximately caused plaintiffs' injury. With respect to the conspiracy claims, plaintiffs have failed to allege with particularity any agreement between any of the defendants and L&H Belgium, and have not specified any acts of the defendants that were in furtherance of the objectives of that agreement. Nor does the amended complaint elucidate how that conduct proximately or reasonably foreseeably caused injury to plaintiffs.

RICO Claims

The requirements of Rule 9(b) also apply to plaintiffs' RICO claims with predicate acts of mail fraud, wire fraud and aiding and abetting securities fraud. *See Moore v. Painewebber, Inc.*, 189 F.3d 165, 172 (2d Cir. 1999). Apart from other problems pointed to by defendants, plaintiffs' RICO claims are deficient in particularity. Plaintiffs allege that each defendant knew and intended that false confirmations given to L&H Belgium's auditors and agreements defendants entered into with L&H Korea would cause L&H Belgium to misrepresent its financial condition to investors in the United States. Plaintiffs further allege that each defendant knew and intended that L&H Belgium would communicate these misrepresentations by means of mail and wire. However, all of these allegations are made on information and belief, and plaintiffs do not specify with particularity the basis of their belief for any of these allegations. As discussed above, it is impossible to understand from the vague allegations of this complaint how the alleged false confirmations could serve as the predicate acts, since plaintiffs do not allege with particularity that these confirmations were issued prior to the acquisition of L&H Belgium stock by Seagate. Furthermore, it is difficult to see how any of the defendants intended that L&H Belgium take any action, since the relationship between the defendant Korean Banks and L&H Belgium has not been

explained with any particularity. Finally, as discussed above, plaintiffs have failed to plead with particularity the elements of aiding and abetting securities fraud. Even if aiding and abetting securities fraud were a predicate act under RICO, plaintiffs' failure to plead its elements with the requisite particularity renders it an insufficient predicate act.

Conclusion

Plaintiffs have already been given leave to file an amended complaint. The amended complaint is deficient in particularity and is therefore dismissed under Rule 9(b). A second amended complaint may be filed by March 31, 2003 setting out with the required particularity plaintiffs' claims against Shinhan. As discussed above, the claims against Chohung and Hanvit are dismissed.

SO ORDERED.

New York, New York

MIRIAM GOLDMAN CEDARBAUM
United States District Judge